

Maximizing Your Results In Settlement: Use It But Don't Be A Victim Of The Numbers Game

Anyone with substantial experience in settling cases knows that settlement negotiation is more art than science. Parties usually go into settlement discussions with a lot of preconceptions regarding the merits of their cases and of their opponents. In my experience, these preconceptions quickly break down once a number

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is put on the table, and the parties are forced to react to it. A number (in the form of an opening settlement offer or demand) can say more about the true merits or demerits of a case than counsel's pre-mediation brief or exposition of his client's case and typically reveals more about a party's attitude toward settlement than any posturing that preceded it. A number, accordingly, is a good and powerful thing in settlement negotiations.

Numbers also have their own logic (i.e., math), and therein lies the danger. Too often, settlement negotiations devolve into a numbers game with each side using the logic of math to make counter-offers or demands. By its very nature, this linear approach to settlement can lead to unexpected or unfavorable results. Large divides in the parties' numbers can cause the parties to walk away from the settlement table when there is actually room for compromise. Parties that are not careful and blindly engage in the numbers game can end up paying more or accepting less in settlement than the circumstances require because of the seeming logic of numbers and the inevitable temptation not to leave without a settlement in hand.

How can parties avoid or at least counter the effects of the logic of numbers so as to maximize their results in settlement? One approach I have used with clients is to not play the numbers game at all in the beginning of the mediation but to focus the mediator and other side on certain substantive issues that are non-negotiable from

my client's point of view and to insist that agreement be reached on those points before any numbers are thrown out by the parties. The benefit of this approach is that, while the resolution of these "non-negotiable" issues inevitably will impact the ultimate numbers, the other side is immediately put on the defensive in negotiations and forced to deal substantively (rather than numerically) with the issues on which the client is the strongest. Concessions can ensue that would never occur if the issue was expressed numerically.

For example, I recently handled a mediation where my client had a strong statute of limitations defense to the other side's damage claims. I had advised the client of the value of the defense to the other side's estimated damages, and it was substantial. Rather than troll out those numbers or assign a probability of success on our statute of limitations defense, what we did at the start of the mediation was tell the mediator and other side that we were at the mediation to negotiate in good faith but that we were not going to negotiate at all if the other side did not concede our limitations defense. The other side hemmed and hawed but after a private session with the mediator conceded this (their weakest) point. By insisting that this issue was non-negotiable and forcing the other side to deal with the substance of our position by tying it to their good faith in negotiations, we successfully wiped out what would have been a colossal difference in our numbers at start of the mediation and set the stage for further, substantive concessions from the other side.

Another approach I have used is to purposely allow the numbers game to play out and then, after the other side's frustration level has built over the large gap in the parties' positions, come in with a "logical" solution to bridge that gap, albeit in a way far superior to my client than if we had just split the difference in our numbers. As most lawyers have observed, a certain amount of angst and exasperation often is essential if substantial

movement in the parties' numbers is to occur. It is not coincidental that most mediations last longer than expected or that settlements are reached late in the mediation session. After spending the last few months or years being pumped up by counsel, most business people believe their claims or defenses are solid, their litigation positions are correct, and their predictions on how the case should settle accurate. Only after spending a substantial amount of time hearing from opposing counsel and his client do people's perspectives soften and more closely align with reality. Thus, sometimes it will serve the client's interests to allow the numbers game to proceed even if it is evident that it inevitably will result in a stalemate because of a large difference in how the parties value the case. When this stalemate is reached and the prospect that one or both sides will abandon the discussions becomes real, there is an opportunity for counsel or his client to introduce a logical concept to break the numbers log-jam.

For example, I once handled a mediation for a client where our bottom line number was derived in the traditional way, namely by taking my client's ultimate exposure in the case and multiplying it by our likelihood of success. During the settlement negotiations, we realized that the number also could be rationalized by how my client had handled other claimants even though the other side's position was not exactly analogous to that of other claimants. Rather than float that concept early on in the mediation and give the other side the opportunity to attach a number to it, distinguish itself from other claimants, and argue up from that number, we decided to let the numbers game play itself out. We feigned exasperation at the difference in the ensuing offers and demands and indicated we thought no resolution of the dispute could be achieved given that difference. As we prepared to leave the mediation, I suggested there was another "more logical" way we could look at resolving the dispute beyond the numbers on the table. Again, rather than attach a number to this concept, we stressed that we needed to know whether the other side would be willing to be treated like what we characterized as similarly situated claimants. Once they indicated their assent to that idea and with a little creative tweaking, we reached a settlement below what my client had authorized me to settle for. The lesson I drew from the experience is that parties sometimes can be convinced to settle for a less favorable amount if they are given

some rationale for the ultimate number, even if that rationale is not perfect and really did not factor into the client's bottom line.

Ultimately, these approaches, like numbers, are just tools for achieving the most favorable result for one's client in settlement. Creative lawyers will not be afraid to use and to freely intermix approaches like claiming certain issues are non-negotiable or using logical (albeit not perfectly analogous) concepts along with numbers to reach the best settlement possible. The trick is knowing when and how to introduce these approaches and numbers into a settlement discussion and convincing the other side that a settlement favorable to your client and different than the other side's bottom line number is better than no settlement at all.

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